

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LOURDES JAROSS and KEN JAROSS,
individually and as husband and wife,

Plaintiffs,

v.

SHAUN PHILLIPS,

Defendant.

2:10-cv-01631-PMP-GWF

ORDER

Presently before the Court is Defendant Shaun Phillips' Motion for Summary Judgment (Doc. #17), filed on May 2, 2011. Plaintiffs Lourdes Jaross and Ken Jaross filed a Response (Doc. #19) on May 26, 2011. Defendant filed a Reply (Doc. #20) on June 8, 2011.

I. BACKGROUND

Plaintiffs Lourdes Jaross ("Jaross") and Ken Jaross ("Mr. Jaross") were in Las Vegas in February 2008. (Pls.' Resp. to Def.'s Mot. for Summ. J. (Doc. #19) ["Pls.' Resp."], Ex. A, Dep. of Lourdes Jaross at 22:13-16.) The Jarosses went to Privé, a nightclub at the Planet Hollywood Resort and Casino, at around 12:00 a.m. on February 5, 2008. (*Id.* at 29:13; 27:12-14; 22:20-21.) Defendant Shaun Phillips ("Phillips") arrived at Privé sometime between 12:30 and 1:30 a.m. that same morning. (Pls.' Resp., Ex. E, Dep. of Shaun Phillips at 17:17-20.) At around 2:33 a.m., an incident occurred between Jaross and Phillips. (Pls.' Resp., Ex. A at 62:6-10; 19:7-14.)

1 Phillips, who is 6'3" and weighs 250 pounds, was in a private table and seating
2 area. (Pls.' Resp., Ex. E at 30:18-22; 23:5-8.) He was with three other individuals. (Id. at
3 71:10-18.) Next to this private area was a raised platform stage that surrounded the club's
4 main dance stage. (Pls.' Resp., Ex. A at 31:11-13.) As the Jarosses were heading out of the
5 club, Jaross's husband suggested she get on the stage and dance before they left. (Id. at
6 31:5-7.)

7 Jaross, who is 5'2" and weighed 130 pounds at the time, states she pulled herself
8 onto the platform stage without assistance and started dancing next to Phillips. (Id. at
9 65:18-20; 31:19-32:2.) Another woman was on the other side of Phillips. (Id. at 43:18-20.)
10 Jaross states she was dancing next to Phillips for a few minutes when she felt an impact to
11 her head. (Id. at 31:25-32:7; 32:18-19.) At her deposition, Jaross testified that Phillips'
12 elbow was the object that struck her face. (Id. at 32:13-15.) However, upon further
13 questioning, Jaross testified she does not know if Phillips elbowed her in the head; she only
14 knows there was an impact to her head. (Id. at 63:15-17.) The impact of the hit was to the
15 side of Jaross's forehead. (Id. at 40:12-15.)

16 Jaross lost her balance after she was hit, causing her to fall backwards. (Id. at
17 34:9-11.) Jaross states she grabbed part of Phillips' back or belt as she was falling. (Id. at
18 33:20-25.) She does not recall whether Phillips also fell because she immediately ran to the
19 restroom after the incident. (Id. at 39:3-11.) Jaross states it is possible she pulled Phillips
20 off the stage as she was falling, but she does not remember. (Id. at 39:9-12.) Jaross was not
21 looking at Phillips when she was struck but asserts Phillips had to be the person who hit her
22 because he was the only person next to her. (Id. at 33:1-7.)

23 Jaross initially testified that she and Phillips had no verbal exchange until after
24 she was hit. (Id. at 32:20-23.) However, when given a police report that contradicted her
25 testimony, Jaross provided a different account of the events, asserting the report refreshed
26 her recollection of the incident. (Id. at 65:15-66:12.) With her refreshed recollection,

1 Jaross avers Phillips first spoke to her when she initially tried to pull herself up on the stage,
2 telling her not to get on the stage. (Id. at 66:9-12.)

3 Jaross admits Phillips did not say anything to indicate he was going to hurt her
4 deliberately, but she alleges he gave her a look that gave her cause for concern. (Id. at 45:4-
5 6; 44:9-19.) Jaross believes the hit was intentional based on its forceful impact. (Id. at
6 42:19-25.) She also assumes Phillips hit her intentionally because she got between Phillips
7 and the other woman who was dancing next to him on the stage. (Id. at 43:1-44:6.) Jaross
8 admits the look Phillips gave her and the injury she suffered are the only bases she has for
9 her belief that Phillips deliberately hit her. (Id. at 44:24-45:3.)

10 Phillips provides a different account of the events. He claims their interaction
11 first began when Jaross tapped him on the leg and asked if she could get up on the raised
12 platform stage. (Pls.' Resp., Ex. E at 24:2-6.) According to Phillips, he told Jaross yes and
13 helped her get on the stage. (Id. at 25:2.) Phillips found Jaross's dancing to be "wild and
14 crazy," causing him to tell her to get off of the stage because it was a private area. (Id. at
15 25:4-11.) Phillips claims he then helped Jaross get off of the stage. (Id. at 26:5-7.)

16 After helping Jaross get down from the stage, Phillips alleges Jaross grabbed the
17 back of his jeans, causing him to fall backwards. (Id. at 26:20-27:4.) Phillips avers he was
18 able to land on his feet on the floor. (Id. at 28:3-5.) Phillips assumes he landed on top of
19 Jaross because she was holding her head when he looked back at her. (Id. at 27:14-17.)
20 Phillips does not remember feeling any part of his body strike her during their brief
21 encounter. (Id. at 29:2-4.)

22 After the incident, Jaross's husband approached Phillips to confront him. (Pls.'
23 Resp., Ex. D, Dep. of Ken Jaross at 26:16-19.) Mr. Jaross did not observe the incident, and
24 he does not remember exactly what he saw that prompted him to confront Phillips. (Id. at
25 27:2-5; 39:10-18.) Mr. Jaross claims the tone of Phillips' voice was threatening, but Mr.
26 Jaross could not recall whether Phillips actually threatened him during the course of the

1 confrontation. (Id. at 31:20-24.) Additionally, Mr. Jaross perceived that Phillips was “put
2 off” when Mr. Jaross confronted him, but he could not say whether Phillips was angry. (Id.
3 at 32:17-19; 31:16-17.) Mr. Jaross believes Phillips intentionally struck Jaross on the bases
4 that an injury occurred and Phillips did not apologize. (Id. at 46 20:23.) Just as Mr. Jaross
5 did not observe the incident, the individuals in Phillips’ group did not observe the incident
6 either. (Pls.’ Resp., Ex. E at 32:21-33:5.)

7 When medical personnel arrived at the scene, they examined Jaross and informed
8 her she did not have a concussion. (Pls.’ Resp. Ex. A at 42:4-9.) Jaross was given the
9 option of either going to the hospital at that time or waiting until the next day to be
10 “checked out.” (Id. at 42:9-11.) Jaross chose the latter option. (Id. at 42:11-12.) She did
11 not feel as though her injury was severe enough to require an overnight hospital stay. (Id. at
12 47:8-12.)

13 A police officer arrived to investigate the incident and spoke to Jaross and
14 Phillips separately. (Id. at 50:15-16; 55:12-16.) Jaross states the officer ultimately decided
15 not to file a police report, as he concluded it was an accident. (Id. at 51:19-21.) Later that
16 day, Jaross went to the police station to file a police report. (Id. at 67:2-14.) Sometime
17 after Jaross returned home to Texas, the investigating officer who had been assigned to the
18 case informed Jaross he could not press charges due to the lack of witnesses. (Id. at 68:15-
19 69:5.)

20 As a result of the impact to her head, Jaross had a bump on her forehead and
21 bruising around her forehead and eye. (Id. at 63:18-23; 86:9-17.) Jaross claims her
22 headaches would not subside and her emotional pain worsened in the days following the
23 incident. (Id. at 75:4-25.) According to Jaross, she had difficulty sleeping and
24 concentrating on work for months after the incident due to the trauma she experienced. (Id.
25 at 76:14-77:24; 78:3-5.) Jaross does not claim she still is suffering from the injury, nor has
26 any doctor told her she will suffer a permanent injury because of the incident. (Id. at 83:3-

1 6; 112:2-5.)

2 Jaross and her husband filed a Complaint in the District Court of Clark County,
3 Nevada, asserting claims of negligence, battery, loss of consortium, and requesting punitive
4 damages. (Def.'s Notice, Ex. 1 at 2-4.) Phillips removed to this Court on September 22,
5 2010.

6 Phillips now moves for summary judgment, arguing Jaross has not provided
7 evidence of negligence or battery. Phillips asserts he could not be found negligent because
8 there is "no evidence of his conduct whatsoever." (Def.'s Mot. for Summ. J. Pursuant to
9 FRCP 56 (Doc. #17) ["Def.'s Mot."] at 6.) Phillips further argues he did not owe a duty to
10 Jaross because she assumed the risk of being injured while dancing on the platform in a
11 crowd. Phillips contends he owed no general duty to Jaross to protect her from colliding
12 with another patron.

13 Additionally, Phillips argues that the intention required for a claim of battery is
14 not present in this case. Next, Phillips argues that Jaross's punitive damages claim must
15 also fail due to a lack of malice and oppression in his actions. Finally, Phillips asserts that
16 because Jaross's negligence and battery claims fail as a matter of law, Mr. Jaross's loss of
17 consortium claim also must fail.

18 Jaross argues that she has provided sufficient evidence that Phillips intentionally
19 struck her because he did not want her in his "'area.'" (Pls.' Resp. at 4.) In support of her
20 negligence claim, Jaross argues that Phillips had a general duty of care towards her,
21 regardless of whether Phillips intentionally struck her. Jaross asserts Phillips breached that
22 duty when he struck Jaross in the face and pushed her "hard enough to knock her off the
23 stage . . . and cause a massive black eye." (Pls.' Resp. at 6.) Finally, Jaross contends
24 punitive damages are appropriate due to the presence of malice in Phillips' actions.

25 Phillips replies that there is no evidence that he was the individual who struck
26 Jaross. Furthermore, Phillips contends there is no evidence he acted intentionally, even if

1 he was the individual who struck Jaross. Phillips asserts that the fact an injury occurred is
2 not enough to infer negligence. Finally, Phillips argues that Mr. Jaross's testimony about
3 Phillips' demeanor after the incident does not create a material factual issue.

4 **II. DISCUSSION**

5 Summary judgment is appropriate "if the movant shows that there is no genuine
6 dispute as to any material fact and the movant is entitled to judgment as a matter of law."
7 Fed. R. Civ. P. 56(a). As determined by the governing substantive law, a material fact is
8 one which might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S.
9 242, 248 (1986). An issue of material fact is genuine if a reasonable fact finder could
10 return a verdict for the non-moving party based on the evidence. Id.

11 The moving party bears the initial burden of proving there is no genuine issue of
12 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To show that a material
13 fact cannot be genuinely disputed, the movant must cite to particular parts of materials in
14 the record or show that the materials cited do not establish the presence of a genuine
15 dispute. Fed. R. Civ. P. 56(c)(1). If the moving party meets that burden, the non-moving
16 party must show that a material fact is genuinely disputed by citing to particular parts of
17 materials in the record or showing that the materials cited do not establish the absence of a
18 genuine dispute. Id.

19 An affidavit or testimony lacking in detailed facts or supporting evidence is
20 insufficient to create a genuine issue of material fact. FTC v. Publishing Clearing House,
21 Inc., 104 F.3d 1168, 1171 (9th Cir. 1997). Reasonable inferences may be made from facts
22 established by circumstantial evidence, but a reasonable inference cannot be based on mere
23 suspicion or speculation. United States v. Thomas, 453 F.2d 141, 143 (9th Cir. 1971).
24 Courts must view the evidence in the light most favorable to the non-moving party. Scott v.
25 Harris, 550 U.S. 372, 378 (2007).

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1 **A. Battery**

2 Under Nevada law, an individual's actions constitute battery where there is "any
3 willful and unlawful use of force or violence upon the person of another." Nev. Rev. Stat.
4 § 200.481(1)(a). A plaintiff must establish a battery claim by showing the actor "intended
5 to cause harmful or offensive contact." Burns v. Mayer, 175 F. Supp. 2d 1259, 1269 (D.
6 Nev. 2001). This includes even the slightest intentional and unwanted exertion of force
7 upon another individual. Hobbs v. State, 251 P.3d 177, 180 (Nev. 2011). Additionally, the
8 plaintiff must establish that the contact actually occurred. Burns, 175 F. Supp. 2d at 1269.

9 Where an offense consists of an act combined with intent, it is just as necessary
10 to prove intent as it is to prove the act itself. Wilson v. State, 450 P.2d 360, 361 (Nev.
11 1969). A fact finder may ascertain an individual's intent through inferences based on the
12 individual's conduct and the attendant circumstances of an incident. State v. Thompson,
13 101 P. 557, 560 (Nev. 1909). Additionally, if the plaintiff suffered an injury, certain
14 inferences, including willfulness, reasonably may be drawn from the nature and extent of
15 the injury. Hern v. State, 635 P.2d 278, 281 (Nev. 1981). If an injury was accidentally
16 inflicted, it is not battery. McDonald v. Sheriff of Carson City, 512 P.2d 774, 775 n.1 (Nev.
17 1973).

18 Jaross has failed to present evidence raising a genuine issue of material fact that
19 Phillips actually struck her. Jaross asserts she was struck by something she assumes was
20 Phillips' elbow, but Jaross did not see who or what hit her; she only felt an impact. Jaross
21 contends that it had to be Phillips who hit her because he was the only person next to her.
22 However, Jaross also testified she assumed Phillips struck her because she got between
23 Phillips and another woman. Phillips, therefore, was not the only person next to Jaross on
24 the platform stage, and thus was not the only person who possibly could have struck Jaross.
25 Viewing the evidence in the light most favorable to Jaross, Jaross has failed to present
26 evidence from which a reasonable fact finder could find that Jaross has met her burden of

1 showing that Phillips struck her.

2 Even if a reasonable fact finder could find that Phillips struck Jaross, Jaross fails
3 to present evidence raising a genuine issue of material fact that Phillips did so intentionally.
4 First, Jaross's argument that Phillips must have hit her intentionally based on the impact of
5 the hit is insufficient for a reasonable fact finder to determine that Phillips acted with intent.
6 There was no evidence of use of a weapon, repeated blows, injuries inconsistent with the
7 defendant's version of events, or previous incidents between the parties from which intent
8 could be inferred. See, e.g., Hern, 635 P.2d at 532-33; Turpen v. State, 583 P.2d 1083,
9 1084 (Nev. 1978); Wallin v. State, 558 P.2d 1143, 1144 (Nev. 1977). Jaross received a
10 black eye as a result of the impact to her head, but the nature and extent of that injury is as
11 consistent with an accidental injury as an intentional one under the circumstances. An
12 accidental collision with Phillips, at 6'3" and 250 pounds, could result in a strong impact to
13 Jaross, who is considerably smaller at 5'2" and 130 pounds. Though Jaross felt a strong
14 impact, that alone does not raise a genuine issue of fact that a battery occurred. A
15 reasonable fact finder could not find that Phillips struck Jaross intentionally based solely on
16 the fact that Jaross experienced a strong impact to her head and suffered an injury.

17 Next, Jaross's argument Phillips must have hit her willfully because he did not
18 want her in his "area" does not raise a genuine dispute as to a material issue of fact that
19 Phillips committed battery. An individual's intent to frighten and intimidate his victim may
20 be considered when ascertaining that individual's intent to harm his victim. See Wilson,
21 450 P.2d at 362 (holding a razor against victim's throat and demanding the victim follow
22 orders shows an intent to frighten and intimidate and is sufficient evidence for a reasonable
23 jury to find an intent to inflict bodily harm). However, Jaross's only communication with
24 Phillips was when Phillips told her he did not want her on the stage and that he gave her a
25 "look." There is no evidence that Phillips indicated he was going to hurt Jaross
26 deliberately, nor is there evidence that Phillips made any threats against her. Moreover,

1 Jaross admits that Phillips did not appear to be angry. Considering the facts in the light
2 most favorable to Jaross, a reasonable fact finder could not find that Phillips hit Jaross
3 intentionally because he did not want her in his “area.”

4 Additionally, Jaross’s assumption that Phillips hit her because she got between
5 Phillips and another woman does not raise a genuine issue of material fact that Phillips hit
6 Jaross intentionally. Jaross concedes it is only her assumption that Phillips struck her
7 because she got between Phillips and another woman. A reasonable inference cannot be
8 made based on mere speculation, and testimony that lacks sufficient supporting facts does
9 not raise a genuine issue of material fact. Accordingly, Jaross’s assumption that Phillips hit
10 Jaross intentionally because she got between Phillips and another woman is not sufficient to
11 raise a genuine issue of material fact that Phillips struck her intentionally.

12 Furthermore, Mr. Jaross’s account of Phillips’ post-incident behavior does not
13 raise a genuine issue of fact that Phillips intentionally struck Jaross. The fact finder can
14 consider post-incident conduct, such as a lack of remorse, an effort to conceal the conduct,
15 demeanor inconsistent with the defendant’s version of events, or an attempt to flee police as
16 evidence of intent. See Flores v. State, 120 P.3d 1170, 1181 (Nev. 2005) (stating that
17 evidence regarding lack of remorse was evidence of consciousness of guilt); Briano v.
18 State, 581 P.2d 5, 8 (Nev. 1978) (stating that post-incident attempt to conceal the incident
19 constitutes evidence of intent); Edwards v. State, 524 P.2d 328, 332 (Nev. 1974). Mr.
20 Jaross admits he did not see Phillips strike Jaross and could not remember what prompted
21 him to confront Phillips in the first place. Mr. Jaross characterized Phillips’ behavior
22 during the confrontation as threatening and said Phillips seemed “put off.” Though Mr.
23 Jaross perceived Phillips as being “put off” when Mr. Jaross approached him, Phillips could
24 have reacted that way for a number of reasons. That, without any supporting evidence, does
25 not raise a genuine issue of material fact that Phillips struck Jaross at all, let alone
26 intentionally.

1 Additionally, Mr. Jaross testified that he believes Phillips struck his wife
2 intentionally based on the fact that Phillips did not apologize. While a lack of remorse for
3 one's actions may be evidence of an individual's state of mind, Mr. Jaross admittedly did
4 not know why he confronted Phillips, and he did not see Phillips strike Jaross.
5 Additionally, Phillips stayed at the scene and spoke to police when they arrived. There is
6 no evidence he attempted to flee, conceal his participation in the incident, or offer a version
7 of events that was inconsistent with the injuries sustained. Mr. Jaross's testimony lacks
8 sufficient evidence to raise a genuine issue of material fact that Phillips struck Jaross,
9 intentionally or at all. Viewing the facts in the light most favorable to Jaross, a reasonable
10 fact finder could not find that Phillips acted with intent based on Mr. Jaross's account of
11 Phillips' post-incident behavior.

12 Individually, the various assertions and assumptions raised by Jaross and Mr.
13 Jaross do not raise a genuine issue of material fact that Phillips struck Jaross intentionally.
14 When construed together, Jaross and Mr. Jaross's assertions and assumptions also do not
15 raise a genuine issue of material fact that Phillips struck Jaross intentionally. The evidence
16 of the incident itself and the evidence of Phillips' behavior throughout and after his
17 encounter with Jaross are insufficient to raise a genuine issue of material fact that Phillips
18 acted with intent. Jaross felt an impact to her face and received an injury but does not know
19 who or what actually struck her. Jaross was concerned by a look Phillips gave her, but she
20 admits Phillips did not threaten her or seem angry. Finally, not only did Phillips not flee
21 before police arrived, but he remained there and spoke with the police when they arrived.
22 Upon evaluating all of the evidence together, Jaross fails to present evidence raising a
23 genuine issue of material fact that Phillips hit Jaross. Even if Jaross could raise a genuine
24 issue of material fact that Phillips struck her, Jaross's claim of battery could not withstand
25 summary judgment because a reasonable fact finder could not find Phillips struck Jaross
26 with intent.

B. Negligence

To prove negligence, the plaintiff must show: “(1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff’s injury; and (4) the plaintiff suffered damages.” Scialabba v. Brandise Constr. Co., Inc., 921 P.2d 928, 930 (Nev. 1996). “Negligence is never presumed but must be established by substantial evidence.” Gunlock v. New Frontier Hotel Corp., 370 P.2d 682, 684 (Nev. 1962). The mere occurrence of an accident or injury does not give rise to a presumption of negligence. Id. Whether a duty of care exists is a question of law to be determined by a court. Scialabba, 921 P.2d at 930. All individuals have a general duty to act reasonably under the circumstances. Moody v. Manny’s Auto Repair, 871 P.2d 935, 943 (Nev. 1994).

Part of the court’s duty analysis involves determining whether the plaintiff assumed any risk by engaging in a certain activity such that the defendant owes no duty to the plaintiff. Turner v. Mandalay Sports Entm’t, LLC, 180 P.3d 1172, 1177 (Nev. 2008). Under the doctrine of primary implied assumption of risk, the court looks to whether an individual impliedly assumed the risks that are inherent in a particular activity. Id. If so, the defendant owed no duty to the plaintiff. Id.

Nevada has not addressed the question of what duty one patron in a nightclub or dance hall owes to another patron. Where a state court has not addressed an issue, the task of a federal court is “to predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1126 (9th Cir. 2005) (quotations omitted). In making that prediction, federal courts look to existing state law without predicting changes in that law. Hemmings v. Tidyman’s Inc., 285 F.3d 1174, 1203 (9th Cir. 2002). However, “federal courts are not precluded from affording relief simply because neither the state supreme court nor the state legislature has

1 enunciated a clear rule governing a particular type of controversy or claim.” Vernon v. City
2 of Los Angeles, 27 F.3d 1385, 1391 (9th Cir. 1994).

3 Generally, courts in other jurisdictions which have addressed the issue have held
4 that primary implied assumption of risk is applicable in certain non-contact sporting
5 activities, and co-participants therefore owe no duty of care to each other unless they
6 engage in some activity that increases the risks beyond those inherent to the activity. See,
7 e.g., Staten v. Superior Court, 45 Cal. App. 4th 1628, 1633-35 (1996) (holding that being
8 cut by the blade of a fellow figure skater is a risk inherent to group figure skating session);
9 McDaniel v. Dowell, 210 Cal. App. 2d 26, 36 (1962) (holding that risk of collision with
10 another skier is inherent to use of ski facilities). The Supreme Court of California reasoned
11 that the combination of each individual participant’s fluidity of action and the presence of
12 co-participants poses an inherent risk of collision in certain non-contact sporting activities.
13 Staten, 45 Cal. App. 4th at 1634 (assumption of risk applies to figure skating and snow
14 skiing, two activities in which one acts alone but in the presence of others). Another
15 driving policy consideration is to “avoid imposing a duty which might chill vigorous
16 participation in the implicated activity and thereby alter its fundamental nature.” Regents of
17 Univ. of Cal. v. Superior Ct., 41 Cal. App. 4th 1040, 1046 (1996).

18 Specifically with respect to social dancing, the Court of Appeals of Louisiana has
19 held that social dance participants assume the inherent risks associated with social dancing,
20 including the risk of contact with other dancers. Heard v. Bonnie & Clyde’s of Hattiesburg,
21 Inc., 501 So.2d 1003, 1007 (La. Ct. App. 1987) (holding the plaintiffs assumed the risk of
22 being bumped, jostled, or falling down by choosing to dance on the same dance floor with
23 other individuals who were dancing at a fast pace but who were not engaged in boisterous
24 conduct or doing anything out of the ordinary). On the other hand, the Court of Appeals of
25 California has held that recreational dancing is not an inherently dangerous activity, making
26 primary implied assumption of risk inapplicable. Bush v. Parents Without Partners, 17 Cal.

1 App. 4th 322, 328 (1993) (holding that social dancing was not inherently dangerous, and,
2 even if it was, slipping and falling on a dance floor is not an inherent risk of social
3 dancing); but see Saville v. Sierra Coll., 133 Cal. App. 4th 857, 869 (2005) (suggesting
4 Bush court erred by confining primary implied assumption of risk only to sports and
5 holding the doctrine applied in a peace officer training class involving arrest and control
6 technique training).

7 The Court concludes Nevada would hold that being bumped, jostled, or colliding
8 with another patron is an inherent risk of social dancing. Although Nevada has not
9 addressed the liability of co-participants in a sporting or recreational activity, Nevada has
10 held that an operator of a sports or activity venue does not need to protect patrons from a
11 known or obvious aspect of attending a certain sporting event or activity. Turner, 180 P.3d
12 at 1175 (holding that baseball stadium operator had to provide sufficient amount of
13 protected seating and must provide protection for spectators in the most dangerous parts of
14 the stadium, but otherwise owed no duty to protect patrons from errant baseballs). The
15 Nevada Supreme Court reasoned that an operator of a sports or activity venue should not be
16 required to take precautions that are unreasonable in light of the nature of the sport because
17 doing so may alter the nature of the game as a spectator sport. Id. at 1175-76. However, an
18 operator of a sports or activity venue must protect patrons from an “unduly high risk of
19 injury.” Id. at 1176.

20 Thus, it appears that Nevada has adopted the general framework of other courts
21 addressing co-participant liability that no duty is owed for risks inherent to the activity, but
22 a duty exists not to engage in acts or omissions that increase the risk beyond what would be
23 expected. Nevada also has endorsed the view that individuals ought to be able to participate
24 in sports and similar recreational activities without fear of being held liable for a risk that is
25 inherent in the nature of the sport or activity. It follows that Nevada would hold that co-
26 participants of certain sporting or recreational activities, like operators of sporting venues,

1 have a duty of care not to increase the risks above those inherent in the sport or activity but
2 should not be required to take precautions that are unreasonable in light of the nature of the
3 sport or activity.

4 Like skiing and ice skating, social dancing involves the fluid movement of
5 individuals near co-participants engaged in the same activity, and thus a risk of collision
6 with other dancers is inherent in the activity. Further, Nevada likely would endorse a policy
7 of encouraging individuals to be able to engage in social dancing without fear of being sued
8 for every bump, jostle, or collision on the dance floor, unless they somehow are increasing
9 the risk beyond what would be expected in ordinary social dancing.

10 Here, even though there were only a few other individuals on the particular stage
11 on which Jaross and Phillips were dancing, Jaross assumed the risk of contact with other
12 dancers, particularly where Jaross testified she placed herself between two other people.
13 Further, Jaross has presented no evidence raising a genuine issue of material fact that
14 Phillips was increasing the risks above those that are inherent in dancing around other
15 individuals. Phillips therefore owed no duty to Jaross.

16 Even if this Court found that Phillips owed Jaross a duty, Jaross failed to present
17 evidence raising a genuine issue of material fact that Phillips breached his duty to act
18 reasonably under the circumstances. Jaross testified that she and Phillips were next to each
19 other on the stage, and Phillips gave Jaross a look. Then, Jaross felt an impact to her head.
20 She assumed Phillips struck her with his elbow, but Jaross could not positively state that
21 Phillips was the individual who struck her. There were no witnesses who observed the
22 incident, and Jaross could not provide specifics about how the incident occurred. Jaross
23 was able to state only that she was struck and received a black eye as a result. She provided
24 no evidence that Phillips was dancing wildly or acting unreasonably in any way.

25 The mere fact that the incident occurred does not give rise to the presumption that
26 it occurred due to Phillips' negligence. Jaross received an injury, but an injury alone does

1 not raise a genuine issue of material fact that she received that injury because Phillips
2 breached his duty to act reasonably under the circumstances. Jaross provided no evidence
3 of Phillips' conduct at all. In fact, she did not see if Phillips was even the individual who
4 struck her.

5 Even if a reasonable fact finder could find that Phillips struck Jaross, there is no
6 evidence that Phillips negligently did so. A claim of negligence must be supported by
7 substantial evidence, and the fact that an incident occurred does not raise a genuine issue of
8 material fact that Phillips breached his duty. Weighing all of the facts in the light most
9 favorable to Jaross, a reasonable fact finder could not find that Phillips breached his duty of
10 reasonable care because there is no evidence of Phillips' unreasonable conduct.
11 Accordingly, Jaross's negligence claim could not withstand summary judgment even if
12 Phillips owed her a duty.

13 **C. Punitive Damages**

14 To receive punitive damages, the plaintiff must prove by clear and convincing
15 evidence that the defendant has been guilty of oppression, fraud, or malice, express or
16 implied. Nev. Rev. Stat. § 42.005(1). Oppression is defined as "despicable conduct that
17 subjects a person to cruel and unjust hardship with conscious disregard of the rights of the
18 person." Id. § 42.001(4). Malice, express or implied, means "conduct which is intended to
19 injure a person or despicable conduct which is engaged in with a conscious disregard of the
20 rights or safety of others." Id. § 42.001(3).

21 Conscious disregard requires "knowledge of the probable harmful consequences
22 of a wrongful act and a willful and deliberate failure to act to avoid those consequences."
23 Id. § 42.001(1). Thus, there must be evidence that a defendant acted with a culpable state
24 of mind, and the defendant's conduct must, "at a minimum, exceed mere recklessness or
25 gross negligence." Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243, 255 (Nev.
26 2008). Punitive damages are not meant to compensate the victim but instead are meant to

1 punish oppressive, fraudulent or malicious conduct. Siggelkow v. Phoenix Ins. Co., 846
2 P.2d 303, 304 (Nev. 1993).

3 Jaross has no claim for punitive damages because her underlying claims for
4 battery and negligence cannot withstand summary judgment. Nevertheless, even if either of
5 those claims could survive summary judgment, Jaross's punitive damages claim could not.
6 Jaross did not produce evidence raising a genuine issue of material fact that Phillips acted
7 with conscious disregard of her rights. Phillips did not threaten Jaross, but Jaross states
8 Phillips gave her a look, causing her to be concerned. The fact that Phillips gave Jaross a
9 look that made her nervous does not raise a genuine issue of material fact that he acted with
10 a conscious disregard for her rights.

11 Jaross also assumes Phillips hit her intentionally because she got between Phillips
12 and another woman. Jaross's assumption that Phillips hit her intentionally because she got
13 between Phillips and another woman does not raise a genuine issue of material fact that
14 Phillips acted with a culpable mind. Viewing all of the facts in the light most favorable to
15 Jaross, a reasonable fact finder could not find that Phillips acted with malice or oppression.
16 Jaross's claim for punitive damages does not withstand summary judgment.

17 **D. Loss of Consortium**

18 A loss of consortium claim is dependant upon the success of the other claims in
19 the suit. Turner, 180 P.3d at 1178 n.31. Because the Court will grant summary judgment in
20 favor of Phillips on all of Jaross's claims, Mr. Jaross's loss of consortium claim does not
21 withstand summary judgment.

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1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant Shaun Phillips' Motion for
3 Summary Judgment (Doc. #17) is hereby GRANTED.

4 IT IS FURTHER ORDERED that the Clerk of Court shall forthwith enter
5 Judgment in favor of Defendant Shaun Phillips and against Plaintiffs Lourdes and Ken
6 Jaross.

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8 DATED: August 9, 2011

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11 PHILIP M. PRO
12 United States District Judge
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